Supreme Court, U.S.
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No. 96-209

In The

Supreme Court of the United States

October Term, 1995

KELLY FOODS CORPORATION and
J.R.B. FOODS, INC.,

Petitioners,

v.

WINDMILL CORPORATION
d/b/a MARTHA WHITE FOODS,

Respondent.

Petition For Writ Of Certiorari
To The Sixth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Windmill Corporation, d/b/a Martha White Foods filed a Complaint against petitioners, Kelly Foods Corporation and J.R.B. Foods, Inc. on November 25, 1992 in the District Court for the Middle District of Tennessee. The Complaint alleged that petitioners had violated Section 43(a) of the Lanham Act by distributing and selling their "CATTY SHACK" cat treat product in packaging which was nearly identical to respondent's "BONKERS" cat treat packaging.

On June 1, 1994, the District Court for the Middle District of Tennessee entered judgment against petitioners, granting a permanent injunction enjoining petitioners from producing, marketing, offering for sale, selling, or distributing "CATTY SHACK" cat treat products in trade dress confusingly similar to respondent's. By Notice of Appeal entered June 29, 1994, petitioners appealed the injunction. Respondent cross appealed. The appeal and cross appeal were docketed as 94-5874/5890.

On June 15, 1994, respondent filed an application for an award of attorneys' fees pursuant to 15 U.S.C. § 1117, to which petitioners responded on July 7, 1994. By Order dated July 21, 1994, the district judge referred respondent's application for an award of attorneys' fees to the magistrate judge. In his Report and Recommendation entered November 29, 1994, the magistrate judge recommended that the district court award attorneys' fees to respondent in the amount of $64,776.53. Petitioners did not file objections in a timely manner to the magistrate's Report and Recommendation. On December 21, 1994, the district court entered an Order adopting the Report and

Recommendation. On that same day, petitioners filed their untimely objections to the magistrate's Report and Recommendation. On January 9, 1995, petitioners filed a Motion for Reconsideration of the December 21, 1994 Order. On February 2, 1995, the district court entered an Order denying petitioners' Motion for Reconsideration. By Notice of Appeal entered February 8, 1995, petitioners appealed the award of attorneys' fees and the denial of the Motion for Reconsideration to the Court of Appeals for the Sixth Circuit. The appeal was docketed as 95-5137.

Upon petitioners' motion and by Order dated June 22, 1995, the Court of Appeals for the Sixth Circuit consolidated 95-5137 and 94-5874/5890 for purpose of submission.

On December 1, 1995, the Court of Appeals for the Sixth Circuit heard oral argument of the issues presented in 94-5874/5890 and 95-5137.

By opinion filed January 26, 1996, the Court of Appeals for the Sixth Circuit affirmed the district court with respect to 94-5874/5890 and 95-5137. On February 7, 1996, petitioners filed a Petition for Rehearing arguing that the Court of Appeals failed to address the issues presented by 95-5137. By Order entered March 26, 1996, the Court of Appeals denied the Petition for Rehearing.

ARGUMENT

The Petition for Writ of Certiorari presents only one question: Whether the Court of Appeals denied petitioners appellate review by not addressing the attorneys'

fees issues presented by 95-5137. The Petition should be denied because the Court of Appeals did review and affirm the district court with respect to the attorneys' fees issues presented by 95-5137.

Petitioners' claim that the Court of Appeals did not review the attorneys' fees issues presented by 95-5137 is without merit. The opinion of the Court of Appeals, on its face, affirms the district court with respect to the consolidated appeals of both 94-5874/5890 and 95-5137. Moreover, the Court of Appeals confirmed that it had affirmed the attorneys' fees issues by denying the Petition for Rehearing that claimed that the Court of Appeals had failed to review the attorneys' fees issues.

Petitioners' only support for its argument that it was denied appellate review is that the Court of Appeals did not explicitly address the attorneys' fees issues in its written opinion. That argument is without merit because a Court of Appeals is not required to provide a written opinion discussing the basis for its decision. *See* F.R.A.P. 36 ("If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court."); F.R.A.P. 41 ("A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue."); Rule of the United States Court of Appeals for the Sixth Circuit 19 ("In those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument."); *Giogione v. The Joseph & Feiss Company*, 1996 U.S. App. LEXIS 19094 (6th

Cir. 1996) ("Because the reasoning that supports judgment for defendant has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose."); *United States v. Jenkins*, 1996 U.S. App. LEXIS 20181 (6th Cir. 1996) ("Dean Jenkins alleges ten errors in the way that the federal government investigated, prosecuted, tried, and sentenced him for drug trafficking. Two of these warrant a detailed written opinion").

Finally, petitioners' position that the Court of Appeals did not review the attorneys' fees issues is not consistent with the procedural facts. The issues relating to the injunction were appealed as 94-5874/5890, and the issues relating to the award of attorneys' fees were appealed as 95-5137. On petitioners' motion, the Court of Appeals consolidated 94-5874/5890 and 95-5137 for the purpose of submission. The parties fully briefed both the injunction and the attorneys' fees issues. In addition, on December 1, 1994, the Court of Appeals heard oral argument on both of these issues. The Court of Appeals then rendered its opinion on January 26, 1996, affirming the district court with respect to both 94-5874/5890 and 95-5137. On March 26, 1995, the Court of Appeals denied petitioners' Petition for Rehearing that raised the precise issue that has been raised again in this Petition. Given these facts, it is clear that the Court of Appeals did, in fact, review the attorneys' fees issues presented by 95-5137.

CONCLUSION

The only issue presented by the Petition for Writ of Certiorari is whether the Court of Appeals denied petitioners appellate review of the attorneys' fees issue presented by 95-5137. The Petition should be denied because the Court of Appeals did review and affirm the attorneys' fees issues. The Court of Appeals confirmed that it had affirmed the attorneys' fees issues by denying the Petition for Rehearing that raised the precise issue that has been raised again in this Petition. Moreover, the Court of Appeals properly affirmed the attorneys' fees issues without a written opinion. Petitioners' argument that they were denied appellate review is, therefore, without merit. Accordingly, the Petition for Writ of Certiorari should be denied, and the costs should be awarded to respondent.

Respectfully submitted,

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